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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-51

ROBERT FUIMAN, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COMES Now the Petitioner, ROBERT FUIMAN, by his undersigned attorneys, and files this his Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REFERENCE TO REPORTS AND OPINIONS

This opinion is directed to the opinion of the United States Court of Appeals for the Fifth Circuit, Case No. 75-4063, dated February 10, 1977, —F. 2d 1436. The opinion is appended hereto as Appendix 1, as required by Rule 23 1 (i) of the Rules of this Court.

GROUNDS FOR JURISDICTION

Jurisdiction of this Court is invoked as follows:

i. The opinion and judgment were entered February 10, 1977.

ii. The order on petition for rehearing was entered on May 10, 1977. The order extending the time to file Petition for Writ of Certiorari to July 9, 1977, is attached. The order on petition for rehearing being appended as Appendix 2, and the order extending time being appended as Appendix 3.

iii. Jurisdiction of this Court exists by virtue of Title 28 U.S.C. 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree:

And, the provisions of Rule 19, Section 1(b) of the Supreme Court Rules.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower

court, as to call for an exercise of this court's power of supervision.

QUESTIONS SHOWN FOR REVIEW

Whether Acquittal of Substantive Counts, a Trial Jury's Written Inquiry, and the Court's Refusal To Instruct, Taken Together Show That the Jury Convicted the Petitioner of Conspiracy While Deciding a Necessary Element of That Crime in Favor of the Petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions

AMENDMENT 5

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes Involved

18 U.S.C. Section 2(a): Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal; (b) Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

21 U.S.C. Section 841(a): Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. Section 952(a): It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

(1) such amounts of crude opium and cocoa leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or . . .

21 U.S.C. 960(a)(1): Any person who

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance . . .

shall be punished as provided in subsection (b) of this section.

21 U.S.C. Section 963: Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

CONCISE STATEMENT OF MATERIAL FACTS

Petitioner was charged in an indictment with four other men under the following five counts:

Count I . . . Conspiracy to Import and Possess Marijuana, Hashish and Cocaine with Intent to Distribute. 21 U.S.C. Section 963

Count II . . . Aiding and Abetting the Importation of Cocaine. 21 U.S.C. Section 952(a)(1), Section 960(a)(1), 18 U.S.C. Section 2

Count III . . . Aiding and Abetting the Importation of Marijuana. 21 U.S.C. Section 952(a), 18 U.S.C. Section 2

Count IV . . . Aiding and Abetting the Possession of Cocaine with Intent to Deliver. 21 U.S.C. Section 841(a)(1), 18 U.S.C. Section 2

Count V . . . Aiding and Abetting the Possession of Marijuana with Intent to Deliver. 21 U.S.C. Section 841(a)(1), 18 U.S.C. Section 2

Counts III and V (the marijuana and hashish counts) and that portion of Count I (the conspiracy count) involving marijuana and hashish were dismissed at the close of the Government's case in response to Petitioner's motion for judgment of acquittal. Petitioner was acquitted of Counts II and IV (substantive cocaine counts) but convicted of Count I, Conspiracy to import and possess cocaine.

The Government's primary witness, Paul Harkless, plead guilty to one count of the indictment in return to having the four remaining counts dismissed. He testified that the Petitioner agreed at a meeting held in June or July of 1974 in Philadelphia to supply the money to purchase the cocaine in Columbia.

He stated that while in Columbia he received $20,000.00 from James Coolbaugh. No other competent or material testimony incriminated the Petitioner in this case.

Although Harkless testified to the arrangements for the transportation of the drugs, those conversations did not involve Petitioner. The other individuals involved in the case were arrested when a plane conveying contraband landed in Florida.

The other Government witnesses testified that they had never met the Petitioner and had no knowledge of involvement by him in the conspiracy.

The Petitioner himself took the stand and denied any participation in the conspiracy. The only events alleged by the Government to connect Fuiman to the conspiracy were the meetings held in Philadelphia.

After counsel's closing arguments to the jury, the Court instructed the jury on the law. In connection

with the two substantive counts (II and IV), the Court defined aiding and abetting and read 18 U.S.C. Section 2 to the jury.

The Court stated:

> "Therefore, one who knowingly and willfully assists in the commission of an unlawful act is guilty as a principal, even though he may have intentionally refrained from committing the direct act constituting the completed offense.
>
> May I explain this a little bit more in detail, perhaps, more simply?
>
> If two or more persons jointly, or as the law says, in concert with each other perform a part or take some step and if all the parts or all the steps taken together result in the commission of a crime, then, all who knowingly and willfully participated are guilty of that offense.
>
> I charge you that one who knowingly and willfully assists in the commission of an unlawful act or willfully causes another to commit an unlawful act is guilty as a principal, even though he may have intentionally refrained from committing the direct act constituting the completed offense.
>
> Accordingly, as to the offenses charged in Counts II and IV, if you find beyond a reasonable doubt that the defendant under consideration did not personally and completely commit the unlawful act charged therein, but that said unlawful act was willfully and knowingly committed by another party or parties, and if you find also that the defendant either aided abetted, counseled, commanded, induced, procured or caused the commission of that offense, you may find the defendant to be guilty as though he were a principal, even though his participation was ever so slight, but there must be some actual participation by him

knowingly and willfully committed towards the commission of the offense charged."

The jury retired to deliberate at 4:24 PM on October 8, 1975. At 5:50 PM, the jury was discharged for the evening.

At 9:00 AM on Ocotber 9, 1975, the jury recommended its deliberation. Some time thereafter, the Court received a communication from the jury which is reported verbatim:

"The jury respectfully requests a reading of Title 21, Section 952(a)(1). R. Farqueson, Foreman

P.S. We feel that defendant, Fuiman, is guilty of financing the conspiracy but may not have known about the cocaine. How do you suggest we resolve this?"

At this point, counsel requested that the Court recharge the jury as to the meaning of the statutory terms "knowingly" and "intentionally", and also recharge on reasonable doubt and the presumption of innocence. These instructions were refused.

At 10:35 AM the jury was brought into open court and Section 21 U.S.C. 952(a)(1) was re-read to them. After a second re-reading of the statute, the foreman asked the Court to read Schedule II, subchapter II which is the schedule referred to in the statute. While the Court did not do that, it did tell the jury that cocaine is a controlled substance within the meaning of the statute.

At 10:43 AM the jury again retired to deliberate and counsel then requested the Court to fully instruct the jury that only the charges involving cocaine were before them. Petitioner asked that the Court clarify this and that the jury be advised that, if the jury did not

feel that Petitioner was part of the cocaine conspiracy, it should acquit him. While the Court made some attempt at clarification, it refused counsel's specific request and omitted telling the jury that only cocaine was involved in the conspiracy count, saying instead that Petitioner was guilty of conspiracy if he agreed to commit "an offense" against the United States. In re-defining Counts II and IV, the Court did state that cocaine was involved.

At 11:40 AM the jury returned with a verdict, convicting Petitioner of Count I (conspiracy) and acquitting him of Counts II and IV.

REASONS FOR GRANTING THE WRIT

Whether Acquittal of Substantive Counts a Trial Jury's Written Inquiry, and the Court's Refusal to Instruct, Taken Together, Show That the Jury Convicted the Petitioner of Conspiracy While Deciding a Necessary Element of That Crime in Favor of Petitioner.

The Petitioner is entitled to have each and every element of a crime proven beyond and to the exclusion of every reasonable doubt. This case, because of the questions raised by the jury, affords the court a special insight into the fact that an essential element was disproved. The judge at the end of the trial charged the jury on conspiracy and aiding and abetting. The charges speak to the issue of knowledge and intent. Thereafter, the jury made inquiry of the judge seeking a re-reading of the statute on substantive counts. But, in their communication to the judge they added a post script which [illegible]ts the due process rights of the Petitioner. The [illegible] advi[illegible]d the trial judge that they felt the Petitioner was guilty of financing the conspiracy. Of course, there is no crime of "financing a conspir-

acy", but only the crime of conspiracy to import cocaine at issue in the case. The jury further wrote that they were not sure whether or not the Petitioner knew of the cocaine.

The jury's question clearly revealed their belief that conspiracy had been shown but that they were not aware of the necessity of knowledge of the type of drug involved as opposed to any other drug violative of the law. This must be considered in context with the realization that other scheduled items were involved in the case; i.e., marijuana and hashish. The court's reinstruction did not clarify the problem the jury felt it faced.

It is, therefore, respectfully urged that the verdict of guilt may well have meant that the jury believed that Fuiman was guilty of conspiracy to import marijuana as opposed to cocaine. The converse may equally be true. But the existence of either possibility creates a deprivation of Constitutional rights.

This Court recently stated in *Henderson* v. *Kibbe,* 97 S. Ct. 1730 (1977):

> "... that since the Constitution requires proof beyond a reasonable doubt of every fact necessary to constitute the crime. *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed. 2d 368, the failure to instruct the jury on an essential element as complex as the causation issue in this case created an impermissible risk that the jury had not made a finding that the Constitution requires."

The cited case is important for the further reason that in this situation collateral proceedings are not involved and objection and request for clarification was made at the time of trial.

In *United States* v. *Lawson,* 507 F. 2d 433 (7 Cir. 1974) cert. den. 95 S.Ct. 1146, 420 U.S. 1004, 43 L. Ed. 2d 762, the court held that although every detail of a plan or acquaintance with every individual involved in the conspiracy is not required for a conviction, a defendant must know of the essential objective of the conspiracy and must have acted to further that objective. Here there is no way of knowing from the jury's question whether the dismissal by the court of the counts involving marijuana and hashish sufficiently advised the jury that they could not believe Fuiman could be convicted of conspiracy to import those scheduled substances as opposed to cocaine since the court merely reread the provisions of Title 21 U.S.C. Section 952.

In *United States* v. *Fellabaum,* 408 F. 2d 220 (7th Cir. 1969), the court reaffirmed the fact that it is fundamental that for a conviction of a conspiracy, the defendant's knowledge of the purpose of the conspiracy must be proven. The question raised by this record is whether the jury knew that the purpose of the conspiracy had to be to import cocaine as opposed to any other controlled substance.

In *Ingram* v. *United States,* 360 U.S. 672, 3 L.Ed. 2d 1503, 79 S.Ct. 1314, this court reaffirmed the requirement that evidence of knowledge must be clear, not equivocal, and that conspiracy charges are not to be made out by piling inference upon inference, thus fashioning a dragnet to draw in all substantive crimes.

CONCLUSION

It is respectfully urged that the Writ should issue so that the entire record may be reviewed.

Respectfully submitted,

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APPENDIX

APPENDIX 1

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

ROBERT FUIMAN, *Defendant-Appellant.*

No. 75-4063.

Feb. 10, 1977.

• • • • • • • • • •

Appeal from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, and TUTTLE and TJOFLAT, Circuit Judges.

TJOFLAT, Circuit Judge:

I

This case arises out of an apparent conspiracy to import several controlled substances into the United States. In September 1974, two men flew a plane to Colombia and returned several days later. Upon their return, they landed in Hendry County, Florida, where they were arrested. A search of their plane revealed that it was carrying about six pounds of cocaine, 578 pounds of marijuana, and 15 pounds of hashish.

Eventually, five men were indicted in connection with these events.[1] The appellant Fuiman was one of the five.

---

[1] The five-count indictment alleged that all five men had committed the following offenses:

Count I—Conspiracy to import cocaine, marijuana and hashish. 21 U.S.C. §§ 963, 952(a).

Count II—Importation of cocaine. 21 U.S.C. §§ 952(a), 960(a)(1).

Fuiman's alleged connection with the conspiracy was financial in nature—the government's case was that Fuiman had bankrolled at least part of the transaction. He apparently was never directly involved with the mechanics of the operation. In fact, Fuiman's alleged activities which connect him with the transaction took place in Philadelphia, Pennsylvania.

Fuiman was tried separately from the other defendants in West Palm Beach, Florida, in early October 1975. The government's case-in-chief was based upon the testimony of three witnesses, all of whom were in some way connected with the smuggling operation. The key witness was one Harkness, who was one of the two men arrested at the time the plane was initially seized. Harkness testified that he had met with Fuiman in Philadelphia several times over the summer of 1974, and that Fuiman had eventually given him—either directly or through a go-between named Coolbaugh—a sum of money totalling about $20,000. This was Fuiman's sole connection with the operation. Moreover, it became apparent during the government's case that there was no evidence to connect Fuiman with the marijuana and hashish smuggling—that is, that Fuiman was at most involved with the cocaine aspect of the deal. Accordingly, the district judge directed (upon timely motion) a judgment of acquittal as to those portions of the indictment dealing with marijuana and hashish, so that the charges relating to cocaine were the only ones remaining when Fuiman's defense began.

Count III—Importation of marijuana and hashish. 21 U.S.C. §§ 952(a), 960.

Count IV—Possession of cocaine with intent to distribute. 21 U.S.C. § 841(a)(1).

Count V—Possession of marijuana and hashish with intent to distribute. 21 U.S.C. § 841(a)(1).

Additionally, Counts II-V charged each of the five men with aiding and abetting the commission of the substantive offenses in violation of 18 U.S.C. § 2.

Fuiman's defense consisted of testimony from several character witnesses and from Fuiman himself, who categorically denied any involvement in the operation. After closing argument, the jury was charged and retired to deliberate late in the afternoon. They deliberated for about an hour and a half, went home, and reconvened at 9:00 the next morning. After a while, the jury sent a note to the judge which read as follows:

The jury respectfully requests a reading of Title 21, Section 952(a)(1).

Art Markusan, Forman [*sic*]

P.S. We feel that defendant Fuiman was guilty of financing the conspiracy but may not have known about the cocaine. How do you suggest we resolve this.

In response to the note, the court read the requested statute twice to the jury. After the reading of the statute, the jury foreman asked the court to read Schedule II, Subchapter II (the schedule of controlled substances referred to in the statute). The court did not do that, but did tell the jury that cocaine was a controlled substance within the meaning of the statute.

The jury again retired to deliberate. After a brief period of further discussion by counsel, the judge again recalled the jury in an effort to clear up possible confusion about the court's dismissal of the marijuana and hashish charges. The court explained that the indictment to the jury—that it charged Fuiman with conspiring "knowingly and willfully to commit an offense against the laws of the United States"—and explained that the offense in question was the violation of the statute which the court had read to the jury a few moments before. The jury then retired once again.

About forty minutes later, the jury returned with its verdict. It found Fuiman guilty of Count I of the indict-

ment (conspiracy) and not guilty of the remaining counts (aiding and abetting the importation of cocaine, and aiding and abetting the possession of cocaine with intent to deliver). Thus, the final result as to each count of the indictment was this:

Guilty—Count I—Conspiracy to import cocaine.[2]

Not Guilty—Count II—Aiding and abetting the importation of cocaine.

Dismissed—Count III—Aiding and abetting the importation of marijuana and hashish.

Not Guilty—Count IV—Aiding and abetting the possession of cocaine with intent to distribute.

Dismissed—Count V—Aiding and abetting the possession of marijuana and hashish with intent to distribute.

Ultimately, Fuiman was sentenced to four years for the conspiracy charge, with three years' special probation.

On this appeal, Fuiman argues (1) that the jury's verdict was fatally inconsistent, and should have been set aside, and (2) that the district judge's supplemental charge to the jury was reversibly deficient because (a) the charge was not sufficiently clear, and (b) the charge was not sufficiently even-handed because it did not contain an explicit instruction on the defendant's presumption of innocence and on the meaning of "reasonable doubt." For the reasons set forth below, we find neither of these arguments persuative and affirm the conviction.

II

With respect to the inconsistency of the jury's verdict, it is well established that inconsistent verdicts on a multi-

[2] Although this count of the indictment had originally charged a conspiracy to import marijuana and hashish as well as cocaine, the district judge had already directed a verdict of acquittal on all marijuana and hashish offenses. Tr. at 181-82.

count indictment do not *per se* invalidate a jury's findings. As Mr. Justice Holmes wrote in *Dunn* v. *United States*, 284 U.S. 390, 393, 52 S.Ct. 189, 190, 76 L.Ed. 356 (1932), "[c]onsistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." Thus, as a general proposition, if a jury has convicted a defendent on one count of an indictment, and the government has adduced evidence legally sufficient to convict the defendant on that count, then whatever the jury did with the remaining counts is immaterial to the appellate inquiry. And this is no less true in a situation where there is a logical inconsistency when the jury's findings on all the counts of the indictment are considered as a whole. *See, e.g., United States* v. *Stiglets*, 463 F.2d 242 (5th Cir. 1972).

In this case, however, Fuiman's argument seems to center on the "overt act" requirement of the federal conspiracy statutes. Fuiman argues that "[t]he only overt act alleged in the indictment connecting [Fuiman] to the conspiracy and the substantive counts was Overt Act 1 of Count 1 . . . ."[3] The overt act he mentions was the alleged meeting between Fuiman and two other men in Philadelphia, at which meeting Fuiman allegedly provided money for the scheme. Fuiman argues that the jury's acquittal of him on the importation and possession with intent to distribute counts necessarily implies that the jury felt that no such meeting took place. Thus, he argues, the conspiracy conviction must fail because there was no overt act to support the conspiracy.

Fuiman's argument misconstrues the overt act element of the conspiracy statute. To convict Fuiman of the conspiracy, the government did not have to show that Fuiman himself committed some overt act. All the government needed to show was that at least one conspirator committed at least one overt act in furtherance of the conspiracy. *See,*

[3] Appellant's brief at 11.

e.g., Braverman v. *United States,* 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23 (1942); *United States* v. *Fontenot,* 483 F.2d 315 (5th Cir. 1973). At Fuiman's trial, the government adduced evidence of a number of overt acts committed by various conspirators, including the actual importation of the cocaine via airplane from Colombia. Thus, even if Fuiman himself had not committed any overt act in furtherance of the conspiracy, that fact would not in itself preclude his culpability under the conspiracy statute.

Fuiman contends, however, that *Herman* v. *United States,* 289 F.2d 362 (5th Cir. 1961), dictates a contrary conclusion. In our view, Fuiman's reliance on *Herman* is misplaced. In that case, a panel of this court reversed a defendant's conspiracy conviction while affirming his conviction of a substantive offense. The defendant, Herman, had been convicted of transporting stolen goods in interstate commerce and of conspiring with two other men, Slofsky and Rapaport, to transport the stolen goods. The only overt act alleged by the government to support the conspiracy was the receipt of the stolen goods by Slofsky and Rapaport. Slofsky and Rapaport, however, were acquitted of receiving the stolen goods. Thus, this court reversed Herman's conspiracy conviction because there were no remaining conspirators besides Herman himself.

Fuiman's chief reliance is placed upon a passage of the *Herman* opinion in which Judge Wisdom writes that

> where the substantive offense is the overt act supporting conviction on the conspiracy count, an acquittal of the substantive offense operates as an acquittal of the conspiracy count, if the acquittal of the substantive offense constitutes a determination that the overt act was not committed.

Id. at 368. This passage is inapposite to Fuiman's case for two reasons. First, it addresses the situation in which a substantive offense is the *only* overt act which is alleged in

support of a conspiracy charge. In Fuiman's case, the substantive cocaine offenses were not the only overt acts alleged to support the conspiracy. Since his acquittal of the substantive cocaine offenses did not constitute a final determination that *no* overt act was committed, the acquittal of the substantive offenses did not operate as an acquittal of the conspiracy count. Second, the passage relied upon by Fuiman did not even remotely address Fuiman's situation, where a defendant is tried under a multi-count indictment alleging a conspiracy offense and various substantive offenses. All that the *Herman* passage purported to deal with was the status of Slofsky and Rapaport, Herman's alleged co-conspirators. The *Herman* panel had to examine whether these two men could be acquitted of the substantive offense in the case but still be considered conspirators to support Herman's conspiracy conviction. The only overt act alleged to support the *Herman* conspiracy was Slofsky's and Rappaport's receipt of the stolen goods. Thus, by acquitting Slofsky and Rapaport, "the jury decided that [they] were not conspirators." *Id.* at 369. From this fact it necessarily followed that Herman himself could not be convicted of conspiracy, since a one-person conspiracy is both a legal and a logical impossibility.

Thus, the *Herman* case is of no real help to Fuiman. He is still confined to the argument that the evidence adduced at trial was insufficient to support his conviction on the conspiracy count. And after a review of the evidence in the light most favorable to the verdict below,[4] we are convinced that there was more than ample evidence to justify the jury's verdict.

III

Fuiman's second argument for reversal—that the district court's supplemental charge to the jury was reversibly

---

[4] *See Glasser* v. *United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

erroneous—centers on the events that transpired after the jury requested that the district judge reread the conspiracy statute. Pursuant to the jury's request, the district judge twice reread the statute to them. The judge expressly refused to comment upon the "P.S." to the note, emphasizing to the jury that he could not suggest how they resolve the factual issues in the case. After fairly summarizing the various counts remaining in the indictment, the district judge added these supplemental instructions:

> You will remember that I charged you what is meant by "knowingly" and "Willfully".
>
> In that connection you were charged that an act is done knowingly if it is done voluntarily and intentionally, and if it is not done because of a mistake or accident or through inadvertence of some kind or for any innocent reason, and you will remember that the word "willfully" was defined as an act done voluntarily and intentionally, and with the specific intent to do something that the law forbids, that is to say with bad purpose either to disobey or to disregard the law.
>
> You will also remember what I told you on so many occasions, and that is that the Government must prove these elements, each element of each offense beyond a reasonable doubt, and in determining these issues you will, of course, review in your mind and carefully consider all the evidence that bears on the elements involved.

Tr. at 371. Additionally, the court informed the jury that cocaine was a controlled substance within the meaning of the conspiracy statute. After the jury had once again retired to deliberate, and the court had once again heard argument from counsel,[5] the court recalled the jury and charged them as follows:

---

[5] The main area of concern expressed during defense counsel's argument to the district court at this juncture was that the jury might have become confused by the dismissal of the marijuana and hashish counts of the indictment. The court pointed out to defense counsel that "they have the indictment and there is no mention of marijuana and hashish in the indictment." Tr. at 374. However, the court agreed to recharge the jury if defense counsel insisted: "If you feel strongly and sincerely that there is some confusion about the marijuana and hashish, Counsel, I am sure that I would honor your reaction and call them back here and charge them on that." Tr. at 375. Subsequently, the court recalled the jury and gave them its second supplemental charge.

THE COURT: After you left the courtroom, Mr. Foreman, and members of the jury, it occurred to the Court that, perhaps, I should call you back and have another word with you.

The reason that the Court sent a copy of the indictment with you to the juryroom is because during the trial the Court entered an order which deleted from the indictment two of the counts which were originally read to you when we were doing the voir dire examination and selecting the jury.

Do you remember?

THE JURY: (Nod in the affirmative)

THE COURT: So that you now have three counts and the first count charges a conspiracy on the part of the defendant, charging that he and others conspired knowingly and willfully to commit an offense against the laws of the United States, and the indictment charges that the offense which constituted the unlawful purpose of the conspiracy was the violation of the statute which I just read to you a moment ago, 952(a).

Count II charges that this defendant unlawfully, intentionally imported into the United States a controlled substance, cocaine, from someplace outside of the United States; and the fourth count charges that this defendant was knowingly and intentionally in possession of cocaine with the intent to distribute it.

> Now, that copy of the indictment was sent to you so that it would be available to you. You have those three separate counts to deal with.
>
> It is necessary, as I told you previously, to unanimously reach a unanimous verdict, if you can, with respect to each of those counts.
>
> Mr. Foreman, and members of the jury, you may retire to the juryroom.

Tr. at 378-79. Forty minutes after receiving these instructions, the jury returned its verdict.

Fuiman argues that the court's supplemental charges to the jury, considered in context, were deficient in two respects. First, he argues that the charges were insufficient to clear away jury confusion putatively arising from the dismissal of the marijuana and hashish charges. Second, he argues that the supplemental charges were prejudicially favorable to the government's case to the detriment of his own case. We cannot agree with either of these contentions.

First, we narrow Fuiman's complaint as to the "jury confusion" issue to an argument over the first count of the indictment, the count under which Fuiman was convicted. In this connection, Fuiman's contention is that the jury was unclear about the scope of Count I following the trial court's directed verdict of acquittal on the marijuana and hashish charges. Of course, the two separate counts involving marijuana and hashish had been completely severed from the indictment, but Count I, which still remained, had originally recited both marijuana/hashish- and cocaine-related conspiracies. Emphasizing this aspect of the situation confronting the jury, and citing Mr. Justice Frankfurter's widely quoted directive that a trial court's supplemental jury instructions should be designed to clear away the jury's difficulties "with concrete accuracy",[6]

[6] *Bollenbach* v. *United States*, 326 U.S. 607, 612-13, 66 S.Ct. 402, 90 L.Ed. 350 (1946).

Fuiman asserts that Count I created a confusion that the trial judge failed to take adequate steps to dispel. We reject this argument because we find the court's supplemental charges both clear and responsive to the jury's inquiry. The court reread the statute as the jury had requested, and explicitly informed the jury that cocaine was a controlled substance within the meaning of the statute. The court never mentioned marijuana and hashish in connection with the conspiracy statute. Additionally, the court in its second supplementary charge reminded the jury that they had a copy of the indictment with them, and the substantive marijuana/hashish counts had already been excised from that indictment. Under these circumstances, we hold that the court's supplemental instructions were sufficiently clear and responsive to the jury's inquiry to fall squarely within the trial court's range of discretion in this area.

In the process of evaluating Fuiman's "jury confusion" argument, we are especially aware of the importance of viewing the record as a whole in order to discern the potential sources of the jury's alleged misconception of the case. Of course, such an inquiry is necessary in a case such as this because it is only through a consideration of what might have misled a jury that we may accurately judge the adequacy of a trial court's response to that jury's inquiries. In Fuiman's case, the record discloses that the existence of any jury misapprehensions arising out of the status of the marijuana/hashish charges is well nigh inconceivable. The court indicated to the jury that the cocaine-related offenses were the only offenses left for them to consider in at least three instances: at the close of the government's case;[7]

[7] As the court explained to the jury:

> The Court has made a ruling which excludes from your further consideration the charges that are set forth in Counts III and V, which pertain to the alleged violations of the laws dealing with marijuana and hashish; so with regard to Counts III and V, you will not be called upon to consider the inno-

in the original instructions to the jury;[8] and in the second set of supplemental instructions.[9] Considered in the light of the whole record, then, Fuiman's first complaint with the court's supplemental charges is meritless.

Fuiman's second complaint is that the court's supplemental charges were reversibly defective because they allegedly failed to avoid favoring the government's case. Specifically, Fuiman argues that the court should have reinstructed the jury on the defendant's presumption of innocence and the meaning of "reasonable doubt." We have read the court's supplemental charges and its original instructions as a whole,[10] and cannot agree. The supplemental

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cence or guilt of the defendant.

Now, with respect to Count I, which is the conspiracy count of the indictment, so much of that count as pertains to and charges a conspiracy to import marijuana and hashish is deleted, stricken.

So, with respect to Count I, the charge now before the jury and the Court, is the charge that this defendant conspired, confederated and agreed with others named therein to knowingly and willfully import into the United States, contrary to Federal law, a controlled substance, cocaine, but not to include a conspiracy to import marijuana and/or hashish.

Counsel, have I stated that clearly and sufficiently?

MR. FERGUSON: Yes, sir.

MR. NATALI: Yes, sir.

Tr. at 187-88.

[8] Wherein the court stated,

> [T]he gist of the offense charged in the conspiracy count of the indictment is the alleged combination or agreement between these defendants to violate Section 952(a), Title 21, United States Code, which has been read several times; and, specifically by unlawfully importing into the United States from a place outside thereof a narcotic controlled substance, cocaine.

Tr. at 345.

[9] See the portion of the record quoted at p. 1441, *supra*.

[10] *See United States* v. *Jackson*, 470 F.2d 684, 688 (5th Cir. 1972); *Perez* v. *United States*, 297 F.2d 12, 16 (5th Cir. 1961).

instructions were, in our opinion, carefully balanced to avoid prejudicing either side's case before the jury. The court did remind the jury of the reasonable doubt standard, though it did not repeat its original full-blown explanation of that standard. While in some instances a complete reiteration of the government's burden of proof and the defendant's presumption of innocence may be the proper course for the trial judge to take,[11] we do not feel that the circumstances of this case warranted such action. In addition to reminding the jury of the government's burden of proof, the court read the statute as the jury had requested, briefly summarized the elements of the offenses charged in the indictment, and completely recharged the jury on the meaning of "knowingly" and "willfully." The court's instructions did not ignore any defense raised by Fuiman,[12] nor did they summarize the legal issues in a manner which in any way prejudiced Fuiman's case.[13] On the contrary, the supplemental charges were rather carefully constructed to avoid favoring either side of the case. Accordingly, Fuiman's argument that they were reversibly erroneous must fail.

IV

In sum, we hold that the inconsistency in the jury's verdict as a whole does not invalidate the portion of that verdict which found Fuiman guilty of conspiracy to import cocaine; that the district court's supplemental instructions to the jury were sufficiently responsive to the jury's inquiry; and that the district court's supplemental instruc-

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[11] *See United States* v. *Sutherland*, 428 F.2d 1152, 1157-58 (5th Cir. 1970) (dictum).

[12] *See United States* v. *Diamond*, 430 F.2d 688 (5th Cir. 1970); *Bland* v. *United States*, 299 F.2d 105 (5th Cir. 1962).

[13] *Cf. United States* v. *Carter*, 491 F.2d 625, 633 (5th Cir. 1974) (condemning trial court's "ad-lib" explanation of circumstantial evidence through an example closely analogous to case *sub judice*).

tions were not prejudicial in failing to include full instructions on the defendant's presumption of innocence and the government's burden of proof. Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-4063

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

versus

ROBERT FUIMAN, *Defendant-Appellant.*

On Petition for Rehearing

Appeal from the United States District Court for the Southern District of Florida

(May 10, 1977)

(FILED MAY 10, 1977)

Before BROWN, Chief Judge, and TUTTLE and TJOFLAT, Circuit Judges. PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ (illegible)
United States Circuit Judge

APPENDIX 3

SUPREME COURT OF THE UNITED STATES

No. A-996

ROBERT FUIMAN, *Petitioner*,

v.

UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 9, 1977.

/s/ LEWIS F. POWELL
Associate Justice of the Supreme Court of the United States

Dated this 2 day of June, 1977.